

## CONFIRMING THE SCOPE OF FIDUCIARY DUTIES\*

*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ)

*Joint venture – Fiduciary duties – Constructive trusts*

### Background

Say-Dee Pty Ltd (Say-Dee) and Farah Constructions Pty Ltd (Farah) entered into a joint venture to purchase and redevelop a property. Farah was responsible for progressing the development application, which was ultimately refused by the relevant Council, on the ground that the property was too narrow so that the redevelopment could only be achieved by adjoining two properties. On the basis of this information, Mr Elias (controlling Farah) caused various parties associated with Farah to purchase the adjoining properties. Say-Dee started proceedings against Farah for breach of fiduciary duty.

The primary judge held that Farah was not under a fiduciary duty to disclose to Say-Dee the opportunity to acquire the adjoining properties as this was outside the scope of the joint venture. The trial judge also found that the agreement was confined to the redevelopment of the property the joint venture intended to purchase and that even if Farah had disclosed the information it had received from the Council to Say-Dee, Say-Dee would not have been in a position financially to participate in the purchase of the adjoining properties.

Say-Dee appealed and was successful. The Court of Appeal holding that Farah by using the valuable information obtained from the Council without the fully informed consent of its co-venturer breached his fiduciary duties. Namely the duties referred to as the ‘no conflict’ and ‘no profit’ rule, which require a party to refrain from withholding information or acting in a manner that would bring its personal interests into conflict with its fiduciary obligations or result in Farah making a profit by using the undisclosed information.

The Court of Appeal also held that the parties associated with Farah who acquired the adjoining properties at Farah's request and without knowing about the breach of fiduciary duty by Farah held their respective interests in these properties on constructive trust for the joint venturers as they fell within the ‘recipient liability limb’ of *Barnes v Addy*.<sup>1</sup> The Court of Appeal furthermore stating that a constructive trust should be imposed ‘for restitution based on unjust enrichment’ of the associated parties at the expense of Say-Dee.

### Decision

The High Court allowed the appeal by Farah, overturning the decision by the NSW Court of Appeal and reinstating the findings of the trial judge. Particularly the court held that the scope of Farah's fiduciary duty was defined by the obligations in its contract with Say-Dee and that those obligations were limited to the particular acquisition and its development.

Whilst Farah did have an obligation to disclose the Council's attitude, as the information came to Farah in its fiduciary capacity, the obligation was met as Say-Dee gave consent to the acquisition of the adjoining lots. The sufficiency of disclosure can depend on the sophistication and intelligence of the person to whom the disclosure must be made and what is required for a fully informed consent is a

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<sup>1</sup> (1874) LR 9 Ch App 244.

question of fact in all the circumstances of the case. Say-Dee had much business experience and intelligence and his unwillingness to participate jointly with Farah in a larger redevelopment meant that Farah was not in breach of any fiduciary duty in proceeding on its own.

### **Liability under the First Limb of *Barnes v Addy***

With respect to the 'recipient liability limb' of *Barnes v Addy* commonly described as 'knowing receipt' the court rejected the Court of Appeal findings stating that there was no relevant receipt of property and the essential requirement of notice or knowledge was not satisfied. The rule permits an imposition of a constructive trust on third parties where they receive and become chargeable with trust property that has been obtained in breach of fiduciary responsibility. The court held that since the information was not confidential and was available in the public domain it was incapable of being classified as property. The information was not a trade secret nor was it possible to trace the information into the units acquired.

The court also rejected any arguments by Say-Dee in favour of changing the law to allow information which a third party obtains from a fiduciary to be classified as trust property, or that land bought by using that information is to be considered trust property. The court ultimately finding that the related parties did not have notice of the alleged breach of duty by Farah and such knowledge cannot be imputed as the related parties had no duty to investigate.

Knowledge was stated to be an essential part of the rule in *Barnes v Addy* and a stranger who receives trust property is not liable unless there is knowledge that the property is being received in a manner which is inconsistent with the trust. The suggestion that such knowledge was not necessary by the Court of Appeal was criticised and seen as an aberration in the face of long-established authority and seriously considered dicta by the High Court.

### **Restitutionary Liability**

The Court of Appeal also held that even if the related parties had no notice of the breach of fiduciary duty, a constructive trust should be imposed on the property by reason of liability 'for restitution based on the unjust enrichment' of Farah and the related parties at the expense of Say-Dee. The High Court equivocally rejected such a conclusion and restated the law of restitution on the issue as it stood prior to the Court of Appeal's decision.

The Court of Appeal judgement found it unnecessary for Say-Dee to prove the related parties received the property knowing of the breach of the fiduciary's duties under the law of restitution. Rather finding only a requirement to establish enrichment at the expense of the plaintiff which is unjust on the ground of some 'recognised factor'. This resulted in a reversal of proof under the rule in *Barnes v Addy* and created a suggestion that recipient liability is restitution based. After considering the authority on this issue the High Court stated that there was no case law to support such an approach and there was 'no satisfactory reason for an intermediate appellate court to effect a radical change in law'.

The unjust nature of the enrichment is 'not determined by reference to a subjective evaluation of what is unfair or unconscionable but recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category'. The areas in which the concept of unjust enrichment applies are specific and long established and recipient liability for breach of trust or

fiduciary duty is not one of them. Furthermore, restitution based liability allows a defence to a bona fide purchaser for value without notice and the related parties fell into this category.

### **Liability under the Second Limb of *Barnes v Addy***

The court also considered the second limb of *Barnes v Addy* which renders a defendant liable for knowingly assisting a trustee or fiduciary in a dishonest and fraudulent design. The court, however, drew a distinction with respect to the requisite type of knowledge stating that the law in Australia should follow the decision in *Consul Developments Pty Ltd v DPC Estates Pty Ltd*<sup>2</sup> which did not see constructive knowledge as sufficient for the second limb of *Barnes v Addy*.

*Consul* supports the proposition that ‘actual knowledge’, ‘wilfully shutting ones eyes to the obvious’, ‘wilfully and recklessly failing to make such inquires as an honest and reasonable man would make’ and ‘knowledge of circumstances which would indicate to an honest and reasonable man’ are sufficient to meet the requirement of knowledge in *Barnes v Addy*. However ‘knowledge of circumstances which would put an honest and reasonable man on inquiry’ is not.

Furthermore *Consul* established for Australia that ‘dishonest and fraudulent design’ can include not only breaches of trust but also breaches of fiduciary duty however any such breaches must be dishonest and fraudulent. The related parties in this case had no ‘actual knowledge of the essential facts which constitute the breach’ and hence were not liable under the second limb of *Barnes v Addy*.

### **Indefeasibility**

Finally the court also stated that the properties of the related parties were protected by s 42(1) of the *Real Property Act* which grants indefeasibility to those registered on title. The fraud exception of s 42(1) did not apply in the present circumstances as the non-disclosure could not be described as ‘actual fraud’ amounting to moral turpitude as required by s 42(1). The related parties were not primary wrong doers and the court held that the fraud exception does not apply to a party who merely had notice of an earlier interest or notice of third party fraud. Hence the registered proprietors prevail over Say-Dee.

## **NEW SOUTH WALES**

### **ANVIL HILL COAL PROJECT APPROVED BY NSW PLANNING MINISTER\***

#### **Introduction**

Since the landmark decision of the NSW Land and Environment Court in November 2006 requiring the environmental assessment of this proposed mine to consider the impact of downstream greenhouse gas (GHG) emissions,<sup>1</sup> the decision of the Minister for Planning on whether the project should proceed has been eagerly awaited.

The Minister approved the Anvil Hill Coal Project (the Project) on 7 June 2007, subject to conditions. The methodology of the assessment conducted for the Minister, and the conditions which have been imposed on the approval (including requiring the mine to purchase a large

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<sup>2</sup> (1975) 132 CLR 373.

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<sup>1</sup> *Gray v Minister for Planning & Ors* [2006] NSW LEC 720. This case was reported at (2007) 26 ARELJ 92.